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No. 947

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In the

Supreme Court of the United States

OCTOBER TERM, 1967

GERALD A. SCHROEDER and
CLARA JOHNSON SCHROEDER,

Petitioners,

vs.

J. C. BUSENHART, et al.,

Respondents.

BRIEF OF SCHOOL RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF OF SCHOOL RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To: The Honorable Chief Justice and Associate Justices of The Supreme Court of The United States.

Respondents, who are past and present members of the Trustees of Schools, the Board of Education and the school administration* in Mount Prospect, Illinois, submit this brief in opposition to the petition for certiorari.

QUESTIONS PRESENTED

1. Whether petitioners have preserved an alleged federal constitutional question for review when they failed to raise it until their petition for rehearing in the Illinois

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* Identified in detail on the signature page of this brief.

Appellate Court, even though they might reasonably have anticipated the ruling which they contend violates their constitutional right (that the condemnation judgment is *res judicata* of their contention that the taking was not for a public purpose) at least as early as the time respondent-defendants' motion for summary judgment was filed in the trial court.

2. Assuming petitioners could raise the question, despite their failure to raise it timely in the state courts, the following: The Illinois courts held barred by *res judicata* petitioners' claim that the purpose for which the school district took their land was to put them out of the fruit and vegetable business rather than for school use. This claim was held to have been determined by the prior judgment in the eminent domain proceeding in which the land was taken for a school site, because under settled Illinois law petitioners could have raised the question of the purpose of the taking in that proceeding but failed to do so. The question is whether this application of the rule of *res judicata* violated petitioners' rights under the due process clause of the Fourteenth Amendment.

STATEMENT OF THE CASE

This case is one of six attempts petitioners have so far made to relitigate the right of the school district to take a certain parcel of land in Mount Prospect, Illinois, for use as a school site. The history of this litigation is reported in *Trustees of Schools* v. *Schroeder,* 23 Ill. 2d 74 (1961); *Trustees of Schools* v. *Schroeder,* 25 Ill. 2d 289 (1962); *People ex rel. White* v. *Busenhart,* 29 Ill. 2d 156 (1963) (deciding consolidated appeals in two cases); *Schroeder* v. *Illinois,* 354 F. 2d 561 (7th Cir. 1965), *cert. denied,* 384 U.S. 972 (1966); and in the opinion of the Appellate Court in this case, *Schroeder* v. *Busenhart,* 80

Ill. App. 2d 431 (1st Dist. 1967). The following is a summary of that history.

The Condemnation Trial and the First Appeal.

The condemnation action giving rise to these proceeding was commenced in the Circuit Court of Cook County, Illinois on November 6, 1959 against petitioners, Gerald A. Schroeder and Clara A. Schroeder, who then owned the land in question. After the Schroeders' amended traverse was denied, the case was tried, and a jury awarded them $267,083.33. The circuit court granted the school trustees' motion for new trial, from which order the Schroeders appealed to the Illinois Supreme Court. That court reversed in *Trustees of Schools* v. *Schroeder,* 23 Ill.2d 74 (1961) and directed entry of the judgment upon the verdict. (The court declined to review the validity of the taking until final judgment had been entered.)

Proceedings on Remand.

On remand, the circuit court entered judgment on the verdict, and the school trustees deposited the amount of the judgment, which with interests and costs totalled $280,956.10, with the county treasurer pursuant to Illinois statute (Ill. Rev. Stat., 1959, Ch. 47, §14). The circuit court thereupon entered an order finding fee-simple title in the school trustees and putting them in possession pursuant to provision therefor in the judgment order and as provided by Illinois law.

The Second Appeal.

The Schroeders again appealed, challenging the validity of the taking. The sole ground they urged was that their land could not be taken because an Illinois statute forbade the school district from taking land within forty

rods of the owner's dwelling. The Illinois Supreme Court held that the statute did not have that effect as to the land in question and affirmed in May, 1962. *Trustees of Schools* v. *Schroeder,* 25 Ill.2d 289 (1962).

After their counsel had filed a petition for rehearing in the Supreme Court, the Schroeders retained new counsel. These new counsel filed in the Illinois Supreme Court a motion for a stay and a motion for leave to file an additional petition for rehearing. The court denied these motions and, on September 27, 1962, denied rehearing.

Further Proceedings in the Trial Court.

While the petition for rehearing was pending, the Schroeders, through their new counsel, filed various motions and petitions in the trial court seeking to assert new grounds for challenging the validity of the taking. After the denial of rehearing by the Supreme Court, the trial court overruled these various petitions and motions. The trial court also granted the school authorities a supplemental writ of possession directing the re-eviction of the Schroeders (who had unlawfully reoccupied the property while the school was being constructed).

The "Taxpayers' Suit."

At about the same time, in September, 1962, the Schroeders, purporting to join with them certain other alleged taxpayers, filed a petition (under Ill. Rev. Stats., 1951, Ch. 113 § 44) for leave to file a taxpayers' suit for injunction, which also sought to challenge the validity of the taking. The circuit court denied leave to file the taxpayers' suit.

The Third and Fourth Appeals.

The Schroeders thereupon appealed to the Illinois Supreme Court from the judgment denying leave to file the taxpayers' suit and from the order overruling their various petitions and motions in the condemnation suit in which they had sought to raise new points challenging the validity of the taking. The Illinois Supreme Court consolidated these appeals (over the objection of the Schroeders) and in May, 1963, affirmed the circuit court. *People ex rel. White* v. *Busenhart,* 29 Ill.2d 156 (1963).

With reference to the Schroeders' petitions and motions in the condemnation case, the court held that all points therein raised were or could have been raised in the second appeal and therefore were conclusively adjudicated against the Schroeders by the decision on that appeal. (29 Ill.2d at 159.) Turning specifically to the free-simple-title argument which is asserted in the petition for certiorari at bar (p. 16), the court continued (29 Ill.2d at 159-60):

> "Despite the rule [barring the raising of any point that could have been raised on the prior appeal], the prayer of the petition for the taking of a fee-simple title, and the failure to even include the question in the traverse,* the Schroeders contend that it goes to the jurisdiction of the court and can be raised either directly or collaterally. In *Chicago Housing Authority* v. *Berkson,* 415 Ill. 159, the right of the condemnor to acquire property by eminent domain was questioned and alleged to be jurisdictional. It was there said, at pages 161 and 162: '* * * (T)he objection was waived by failure to raise it at the appropriate time. The objection goes only to the right of the condemnor to

* This refutes petitioners' false assertion (Petition, p. 4) that the fee-simple title question was raised in the traverse. The traverse and amendment thereto are not part of the record.

> acquire property by eminent domain. It does not effect the general jurisdiction of the court over the subject matter of an eminent domain action.' There, the condemnor's right to acquire by eminent domain was attacked, while here only the extent of the estate to be taken is alleged to be grounds for going behind the judgment. We are of the opinion that the fee-simple-title question is barred."

With reference to the taxpayers' injunction suit, the Illinois Supreme Court stated that the petitioners therein again sought to raise "the points urged in the eminent domain case." The court held that its judgment in the second appeal in that case was "not subject to collateral attack since the court had jurisdiction of the subject matter and the parties." (29 Ill.2d at 162.)

Petitioners filed a petition for rehearing which was denied. They did not file a petition for certiorari in this Court.

The Federal Action.

The Schroeders next filed an action in the United States District Court, in which they again sought to relitigate the question of whether the school district had the right to take the land for school purposes. They asked for a declaratory judgment that the state court judgments and orders in the condemnation case were void; that plaintiffs be declared to be the rightful owners of the condemned property; and that the State of Illinois, the Trustees of Schools, and the School District be enjoined "from exercising any ownership over the premises herein and before described, or interfering with the rights of the plaintiffs as the rightful owners of the premises." (A. 20-21 in Case No. 1248, October Term 1965, in this Court.)

The district court dismissed the action, and the Court of Appeals for the Seventh Circuit affirmed. Both courts held that the federal courts lack jurisdiction to review collaterally judgments of state courts having jurisdiction over the person and subject matter and that the questions sought to be raised had been conclusively adjudicated against petitioners in the condemnation proceeding. *Schroeder* v. *Illinois,* 354 F. 2d 561 (7th Cir. 1965). This Court denied certiorari. 384 U. S. 972 (1966).

The Case at Bar.

The complaint in the case at bar was filed shortly before the federal action just described. The fifty defendants include past and present members of the School Board, the School Trustees, and the school administration, the deputy sheriffs who carried out the eviction orders, contractors hired to build the school, and the utility company which shut off petitioners' electric power after the Court had ordered them evicted.

The complaint alleges that the fifty defendants conspired in December, 1961 (which is when petitioners were evicted pursuant to the Court order carrying out the condemnation judgment) to take possession of the subject property and thereby destroy the fruit, vegetable, and Christmas tree business petitioners conducted there; and that defendants did so because petitioners were selling their produce at lower prices than their competitors. (Abst. 16-17, 21.) No defendant is alleged to be a competitor of petitioners or engaged in the produce business. The overt acts alleged to have been committed by various individual defendants are alleged to have been in furtherance of and pursuant to the supposed conspiracy and "for the sole

purpose of" achieving the object of the conspiracy. (Abst. 16, 17, 19, 21, 22, 25.)

Near the end of their complaint, following the conspiracy allegations, petitioners ask "in the alternative that if this Court does not deem the various acts and omissions of these defendants to constitute a conspiracy" that judgment be awarded "against the individual persons who committed the various acts of wrong doing herein and before set forth." (Abst. 25.)

The Illinois trial court entered summary judgment in favor of defendants, without prejudice to petitioners' right to assert in separate suits against individual defendants any tort claims charged against any of them.

The Appellate Court of Illinois affirmed, holding that petitioners' claim that defendants took possession of their property not for a public purpose but for the purpose of destroying their fruit and vegetable business because they were underselling their competitiors could have been raised in the condemnation case and was therefore barred by the judgment in that case. The Appellate Court also held that "because the conspiracy count fails on the ground of *res judicata,* the individual torts pleaded against various defendants are without adequate relation to each other for the purpose of being joined in a single action." Since petitioners had not sought leave to amend their complaint to plead each individual tort in a separate count, as required by the Illinois Civil Practice Act, the trial court had properly dismissed without prejudice as to the several individual tort claims.

Defendants also filed in the trial court a motion to assess attorneys fees and costs against plaintiffs under Section 41 of the Illinois Civil Practice Act (Ill. Rev. Stat., 1963, Ch. 110, § 41), which provides for assessment of such

expenses incurred by reason of allegations in a pleading "made without reasonable cause and not in good faith, and found to be untrue." The trial court denied this motion, but upon defendants' cross appeal the Appellate Court sustained the motion and remanded the case to the trial court for hearing to determine the amount of the expenses allowable. No final judgment has been entered pursuant to this remanding order.*

Petitioners filed a petition for rehearing in the Illinois Appellate Court in which they raised for the first time, as they concede (Petition, p. 9), the claim that the application of the rule of *res judicata* to bar them from challenging the purpose of the taking in this proceeding denies them due process of law in violation of the Fourteenth Amendment. The petition for rehearing was denied without opinion.

Petitioners then filed a petition for leave to appeal to the Supreme Court of Illinois, which that court denied without opinion. This petition for certiorari followed.

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* In addition, the School Trustees and the School Board, in their corporate capacities, filed a petition for leave to intervene in this case for the purpose of seeking an injunction against further vexatious relitigation by petitioners. The trial court, in its order granting summary judgment to defendants, denied this petition without prejudice to the school authorities' right to seek such relief in an independent proceeding in equity. (Petitioners, p. 9, neglect to inform this Court that the denial was without prejudice.)

ARGUMENT

I.

The Alleged Federal Constitutional Question Was Not Timely Raised.

Petitioner admittedly failed, prior to filing their petition for rehearing in the Illinois Appellate Court, to raise the alleged federal constitutional question they seek to present here. (Petition, p. 9.) The rule, as this Court stated it in *Herndon* v. *Georgia*, 295 U.S. 441, 442 (1935), is as follows:

> "The long-established rule is that an attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it."

Accord, *Radio Station WOW* v. *Johnson*, 327 U.S. 120, 128 (1945); *Hanson* v. *Deuckla*, 357 U.S. 235, 243-44 (1958); *Bloeth* v. *New York*, 82 Sup. Ct. 661 (1962) (opinion by Mr. Justice Harlan denying stay). Stern and Gressman, Supreme Court Practice, p. 98 (3d ed. 1962).

Neither the Illinois Appellate Court nor the Illinois Supreme Court actually entertained the question and decided it. Illinois does not permit the raising of a question for the first time in a petition for rehearing. Illinois Supreme Court Rule 367 (Ill. Rev. Stat., 1967, Ch. 110A, § 367); *Sobina* v. *Busby*, 62 Ill. App. 2d 1, 25-26 (1st Dist. 1965). The Illinois Appellate Court therefore denied rehearing without opinion and the Illinois Supreme Court denied leave to appeal without opinion.

Moreover, under Illinois procedure, petitioners were required first to present their contention to the trial court

as a prerequisite to raising it at all on appeal. *Ray* v. *Chicago,* 19 Ill. 2d 593, 602 (1960). When such a requirement of state law is not complied with and the state reviewing court ignores or fails to notice the supposed federal question, this Court will refuse to review the question because it was not timely raised. *Bailey* v. *Anderson,* 327 U.S. 203, 206-207 (1945); *Chicago, Ind. & L. R. Co.* v. *McGuire,* 196 U.S. 128, 131 (1905); Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States, pp. 118-119 (Wolfson and Kurland ed. 1951). A constitutional question which is not raised in the manner required by applicable state procedure will not be considered by this Court. *Beck* v. *Washington,* 369 U.S. 541, 549 *et seq.* (1962); Stern and Gressman, *op. cit., supra,* p. 95.

Stembridge v. *Georgia,* 343 U.S. 541 (1952) is squarely in point. There, as here, the question was raised for the first time by petition for rehearing in the state intermediate reviewing court, which, like the Illinois Appellate Court here, denied rehearing without opinion. There, as here, the state Supreme Court declined without opinion to review the case. This Court refused to review the case, pointing out that under Georgia law a constitutional question must first be raised in the trial court, and concluding (p. 547):

> "... the Supreme Court of Georgia could have denied certiorari on adequate state grounds. Where the highest court of the state delivers no opinion and it appears that the judgment *might* have rested upon a nonfederal ground, this Court will not take jurisdiction to review the judgment. [Citing cases.]" (Emphasis is the Court's.)

Petitioners cannot bring themselves within the rule of the "surprise" cases, an example of which is *Brinkerhoff-*

Faris Trust and Savings Co. v. *Hill,* 281 U.S. 673 (1930), cited in the petition (pp. 13, 15). In that case the federal constitutional question could not reasonably have been anticipated prior to the opinion of the state reviewing court, and it was therefore presented at the first opportunity when it was raised in the petition for rehearing. See Stern and Gressman, *op. cit., supra,* p. 99. To fall within the rule of such cases petitioner must demonstrate that "the question was first brought into the case by an unexpected decision of the highest state court, and that the litigant had no prior opportunity to assert the claimed federal right or immunity." Robertson and Kirkham, *op. cit., supra,* p. 130. These conditions are not met by petitioners here.

In the case at bar it was asserted in defendants' motion for summary judgment, filed in the trial court, that the court judicially knew, from its own records, that petitioners were ousted from the property pursuant to a condemnation judgment which was binding upon them, and it was therefore conclusively determined that they were not ousted for the purpose of destroying their fruit and vegetable business. (Abst. 50-55.) The Illinois Supreme Court holds that in a condemnation proceeding the owner is entitled to assert the defense that the taking is not for a public purpose. *Deerfield Park District* v. *Progress Development Corp.,* 22 Ill. 2d 132 (1961). Illinois also bars raising in a later action any ground that could have been presented in an earlier action in which there has been a final judgment. *People ex rel. White* v. *Busenhart,* 29 Ill. 2d 156 (1963). Petitioners knew when the motion for summary judgment was filed in the trial court, and they knew when the case was later briefed in the Illinois Appellate Court, that defendants were asserting that the condemnation judgment had conclu-

sively adjudicated the public purpose of the taking. Under Illinois law petitioners were obligated to raise in the trial court the contention that applying the rule of *res judicata* to them would violate their federal constitutional rights.

Even if the record did not show petitioners could reasonably have anticipated such a ruling as early as the trial court proceeding, they would have the burden of showing they could not reasonably have anticipated it prior to the Appellate Court's opinion. Petitioners have the burden of showing that the point was raised at the earliest time they could reasonably have anticipated a ruling that their claim was barred by the condemnation judgment. They have not, however, filed here the briefs in the Appellate Court (as they might have done, Stern and Gressman, *op. cit., supra,* p. 225) or otherwise made any attempt to discharge that burden. Their failure to do so raises the inference, which is in accordance with the fact, that the *res judicata* argument which the Appellate Court sustained was made in the briefs of defendants (respondents here) in that Court.

Petitioners' failure to raise the question until their petition for rehearing in the Illinois Appellate Court forecloses review by this Court.

II.

No Substantial Federal Question Is Presented.

Even if it had been properly raised and preserved, the question petitioners seek to present is not a substantial federal question.

The very existence of the question is predicated on the assumption that petitioners have never had an opportunity to be heard on their conspiracy charge. (Petition,

pp. 11, 12-13.) This assumption is false. It is based upon a disregard of the holding of *Deerfield Park District* v. *Progress Development Corp.*, 22 Ill. 2d 131 (1961), 174 N.E. 2d 850 (1961).

The gist of petitioners' conspiracy charge is that their land was taken for the purpose of destroying their fruit and vegetable business because they were underselling their competitors, and not for a public purpose. This contention could have been asserted in the condemnation case.

In the *Deerfield* case, *supra,* cited by the Appellate Court in this case (Petition, p. 7a), the Illinois Supreme Court held that although the motives that may have actuated the members of the condemning authority were not a proper subject of judicial inquiry in any proceeding, the question of whether the taking was for a public purpose could be raised and should be determined in the condemnation proceeding. And see *Duffy* v. *Frankenberg,* 144 Ill. App. 103 (1st Dist. 1908), also cited by the Appellate Court. (Petition, p. 7a.) That question, and all other questions that could have been raised in the condemnation case were conclusively adjudicated by the judgment in that case. *People ex rel. White* v. *Busenhart,* 29 Ill. 2d 156, 159 (1963).

Petitioners' misleading treatment of the *Deerfield* case ignores this holding and asserts that the case precluded them from making their no-public-purpose contention in the condemnation case because that case does not "permit examining the motives of officials in a condemnation action." (Petition, pp. 12-13.) The *Deerfield* case holds that the motives that may have actuated the members of the condemning body to cause them to vote in favor of the taking, could not be a proper subject of judicial in-

quiry in any proceeding. Whether the action of the condemning body is for a public purpose, which is the only inquiry in this area that can be made in the condemnation case or any other case, can and should be made, the *Deerfield* case holds, in the condemnation case. Petitioners could have, but did not, show in the condemnation case that the condemnation was brought to accomplish the alleged conspiracy and not for a public school purpose.

It is immaterial that, as petitioners argue (Petition, p. 12) the School Trustees acted as a body corporate in the condemnation case and are named here as individuals. Under Illinois law, as declared by the Appellate Court, the question of the public purpose of the taking cannot be collaterally challenged after the condemnation judgment is final and the school has been built on the land, by the expedient of suing the individual members of the school body. This Illinois rule is consistent with federal authorities on privity of parties as it pertain to *res judicata*. *E.g.*, *Zdanok* v. *Gliddon*, 327 F. 2d 944 (2d Cir. 1964); *Gart* v. *Cole*, 263 F. 2d 244 (2d Cir.), *cert. denied*, 359 U.S. 978, 79 Sup. Ct. 898, 3 L. Ed. 2d 929 (1959); *Bruszewski* v. *United States*, 181 F. 2d 419 (3d Cir.), *cert. denied*, 340 U.S. 865, 71 Sup. Ct. 87, 95 L. Ed. 632 (1950).

It is likewise immaterial to argue, as do petitioners (Petition, p. 12), that the condemnation suit was a proceeding to obtain title to land, while this is "an action for conspiracy to destroy the petitioners' business." Petitioners action here is predicated on a contention, *i.e.*, that the taking was for an unlawful, not a public, purpose, which was adjudicated against them by the condemnation judgment. Since this contention is the basis for their claim here, that claim is defeated by the condemnation

judgment, which, of necessity, excludes acquisition of the land for any purpose other than for a public school.

Petitioners' Claim That They Still Own the Land.

Petitioners' bad faith and the deliberately vexatious character of this action are illustrated by their claim that, despite some five prior judgments to the contrary, they are still the owners of the land. (Petition, pp. 16-18.) They ignore repeated holdings of the Illinois and federal courts that the Illinois condemnation court had jurisdiction over the parties and the subject matter and that its adjudication of fee-simple title in the School Trustees cannot be collaterally attacked. *People ex rel. White* v. *Busenhart,* 29 Ill. 2d 156, 159-60 (1963); *Schroeder* v. *Illinois* 354 F.2d 561, 563 (7th Cir. 1965); *Schroeder* v. *Busenhart,* 80 Ill. App. 2d 431 (1st Dist. 1967) (the decision below).

Petitioners' assertion that there has never been an adjudication that the condemnation court had jurisdiction is false. In its opinion on their third and fourth appeals, the Illinois Supreme Court (*People ex rel. White* v. *Busenhart,* 29 Ill. 2d 156, 159-60 (1963)) squarely held that the condemnation court had jurisdiction, and that therefore "the fee-simple-title question is barred." The Court of Appeals for the Seventh Circuit has also held that the Illinois condemnation court had jurisdiction over the parties and the subject matter and that therefore its judgment could not be collaterally attacked. *Schroeder* v. *Illinois,* 354 F. 2d 561, 563 (7th Cir. 1965), *cert. denied,* 384 U.S. 972 (1966).

Although the point is immaterial, petitioners are also wrong in their fundamental premise that under Illinois law a school district cannot acquire fee-simple title by eminent domain. (Petition, p. 16.) The federal case they cite for this proposition has been discredited by a later

Illinois decision, *City of Waukegan* v. *Stanczak*, 6 Ill. 2d 594 (1955), and by the 1959 Illinois School Code (Ill. Rev. Stat., 1959, Ch. 122, §§ 7-17, 4-21, 4-22, 4-23, 4-28). This point of Illinois law is discussed in more detail in our brief in opposition to petitioners' earlier petition for certiorari, October Term 1965, No. 1248, pp. 17-19.

The Assessment of Expenses for Pleading in Bad Faith.

The Appellate Court found, on the basis of the repeated prior judgments against them in cases in which they had made the same contention, that petitioners' allegations that they owned the land in spite of the condemnation judgment giving ownership to the School Trustees were made in bad faith and without probable cause. The correctness of this holding, based upon judicial proceedings of which the court took judicial notice, cannot seriously be questioned. The assessment of expenses caused by these false allegations is authorized by Section 41 of the Illinois Civil Practice Act (Ill. Rev. Stat., 1965, Ch. 110, § 41). Granted the allegations made in bad faith, the imposition of such a sanction does not raise a federal question, and petitioners do not contend that it does. Similar sanctions are imposed by the federal courts. 6 Moore, *Federal Practice*, ¶ 54.77[2], at 1352 (2d ed. 1966). *Accord, Bell* v. *School Board*, 321 F. 2d 494, 500 (4th Cir. 1963); *Rolax* v. *Atlantic Coast Line R.R.*, 186 F. 2d 473, 481 (4th Cir. 1951); *Taussig* v. *Wellington Fund, Inc.*, 187 F. Supp. 179, 222-23 (D. Del. 1960), *affirmed*, 313 F. 2d 472 (3rd Cir. 1963), *cert. denied*, 374 U.S. 806 (1963).

CONCLUSION

The petition for certiorari, which is but the latest episode in petitioners' campaign of unceasing relitigation against the school district, is frivolous and should be denied.

Respectfully submitted,

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